UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA,	)	
	)	**Docket No. 3:14-CR-00082**
Plaintiff,	)	**District Judge Trauger**
	)	
v.	)	**18 U.S.C. § 3661**
	)	**Fed. R. Crim. P. 32(i)**
RAJESH C. PATEL,	)	**USSG § 1B1.4**
	)	
Defendant.	)	

MEMORANDUM IN AID OF SENTENCING
ON BEHALF OF RAJESH C. PATEL

I. INTRODUCTION

It is no small task for a court to comprehend a defendant standing before it. Counsel respectfully submits this memorandum to help the Court know more about Mr. Patel, and the circumstances surrounding his offense.

Mr. Patel pleaded guilty to two counts of wire fraud, in violation of 18 U.S.C. § 1343, for misusing $500,000 of investor money during the housing bubble burst. Mr. Patel repaid that investor, plus interest, prior to entering a guilty plea in this case (Exhibit 3). During the course of civil litigation that preceded the filing of the indictment Mr. Patel acknowledged that he owed the investor this money.

We respectfully submit letters that we've received on Mr. Patel's behalf, along with the brief video supporting this memo.[1] We try to document Mr. Patel's humble beginnings in war-torn Uganda, and show how those experiences have shaped a man committed to his family, to

[1] Letters submitted on Mr. Patel's behalf are appended hereafter as Exhibit 1; and incorporated by reference. The video presented to the Court is also incorporated by reference.

community service, and to his faith. Mr. Patel has been married to the same woman for over 36 years, and together they raised three sons with impressive work ethics – including a middle son, Mayur ("Mel"), who suffers from significant intellectual disabilities and still lives and works with his parents.

Given this particular offense and offender, we respectfully urge a sentence to probation conditioned upon home confinement and substantial community service.

II. GROUNDS FOR STATUTORY SENTENCE TO PROBATION

The Sentencing Guidelines carry no more weight than any other factor in 18 U.S.C. § 3553(a).[2] In fact, § 3553(a) factors have **greater** breadth than the Guidelines.[3] Sentencing judges cannot put a "thumb on the scale favoring a guideline sentence,"[4] or presume the Guidelines are reasonable.[5] Neither may courts require "extraordinary circumstances" before varying from the Guidelines.[6]

Mr. Patel waived guidelines departure arguments in his plea agreement, and does not seek departures here, though he is asking for a variance from the prescribed guideline range. We discuss a *statutory* probation sentence, and reference Guidelines departures only to frame section 3553(a)'s broader sentencing considerations.

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[2] *United States v. Booker*, 543 U.S. 220, 245 (2005) (sentencing court must consider Guidelines ranges, but tailor sentence in light of other statutory concerns as well).

[3] *United States v. Simmons*, 470 F.3d 1115, 1130-31 (5th Cir. 2006).

[4] *United States v. Sachsenmaier*, 491 F.3d 680, 685 (7th Cir. June 2007).

[5] *See United States v. McElheney*, 524 F.Supp.2d 983, 988 (E.D. TN. 2007) (quoting *Sachsenmaier*, 491 F.3d at 685 .

[6] *Gall v. United States* 552 U.S. 38, 47 (2007); *see also United States v. Nelson*, 555 U.S. 350, 352 (2009) (The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable). *accord United States v. Bolds*, 511 F.3d 568, 580-81 (6th Cir. 2007) ("we do not, and indeed after *Gall* cannot, "require 'extraordinary' circumstances to justify a sentence outside the Guidelines range."").

A. Nature of Offense – Guidelines Calculation overstates actual offense, especially given extraordinary post-offense rehabilitation of full restitution

The basic facts are recounted in the stipulated facts that accompanied the entry of the guilty plea. Mr. Patel was heavily invested in real estate when the mortgage bubble burst in 2008. He gave into temptation, and used someone else's money to pay his own debts. He then concealed that misappropriation while gathering the cash to reimburse his investor. Mr. Patel did confess to his investor, and promised to return the money. Mr. Patel did return every penny, and added interest to the reimbursement.

The Stipulated Factual Basis acknowledges that, at all times, RC Patel fully intended to credit Kisan with a 14% ownership interest in the Best Western if the mortgage was successfully acquired (Factual Basis, ¶ 8(f)).

There are also several undisputed facts we wish to emphasize:

First, when Kisan provided the $500,000 to RC Patel in early December, 2008, Kisan knew that the mortgage that was intended to be the asset of the partnership had not yet been purchased. An auction would occur to determine whether the partnership could acquire the mortgage, and if so, at what price. Kisan thus knew that his investment was anticipatory and that the money could not, at that time, be used to actually purchase the mortgage.

Second, the only misrepresentation made by RC Patel to Kisan was in late 2008, at a social function in India. Mr. Patel told Kisan that he did not yet know the auction's outcome, when Mr. Patel did know that the Best Western partnership had not acquired the asset. Mr. Patel knew that he could not keep Kisan's money, but he did not then have the cash in a dedicated account to return to Kisan.

Third, within weeks of that misrepresentation, Mr. Patel told Kisan exactly what had happened. Everyone agrees that, in January 2009, Mr. Patel told Kisan that they did not win the bid to purchase the mortgage and that he would refund Kisan's $500,000. Mr. Patel has always acknowledged that he owed the money to Kisan (including in depositions given in 2011 (at pages 103-104) and in 2013 (at 32 – 33)).

Whether Mr. Patel could refund the money that day or not (he did have a line of credit that would have enabled him to refund the money) is not relevant to any allegation that Mr. Patel defrauded Kisan. While Kisan's $500,000 was not parked in a separate account, that is not of itself fraudulent conduct. And, though Mr. Patel did not repay Kisan with certified funds, this reflects an unpaid debt rather than fraudulent conduct. As of the end of December 2008, Mr. Patel owed money to Kisan. Kisan has acknowledged that he had access to the partnership bank account, because he was on the signature card (Exhibit 2).

Finally, the court should consider the events surrounding the Best Western transaction in late 2008 and early 2009. This transaction's genesis was the failure of Integrity Bank in Atlanta, Georgia, which held the mortgage being auctioned against the Best Western. Along with many other investors, Mr. Patel's community bank (Hightrust Bank) was asked to bid on the assets of Integrity Bank which were being auctioned by the FDIC (Exhibit 11).

Integrity Bank was one of scores of community banks in Georgia that folded during the 2009-2010 financial debacle. Georgia had the highest number of community bank failures in the country (over 75 banks failed in Georgia; Tennessee, by contrast, had 5 bank failure between 2009 – 2015).[7] Real estate ventures crashed. Lawsuits between partners abounded. A lot of people were looking for a way to save their investment dollars as the global economy tanked. Two banks on which Mr. Patel served on the Board of Directors were taken over by the FDIC.

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[7] http://www.bankrate.com/finance/banking/failed-banks-tennessee.aspx

We do not suggest that these surrounding circumstances justify fraudulent conduct. But, when examining dockets from Georgia's Superior and federal courts through this period, there are an astounding number of lawsuits alleging that one partner's misrepresentation led to a real estate failure.

This case – like many others – resulted in civil litigation in which the parties, without a trial, ultimately sorted out their respective financial responsibilities. Unlike the vast majority of civil cases, however, this case also resulted in a criminal prosecution, despite that:

(1) no fraud was perpetrated against the government;

(2) no fraud was perpetrated against any bank or financial institution; and

(3) the dispute between two savvy business partners, and friends for over twenty-five years, was fully resolved in civil litigation without a trial.

When "the offense level determined under this guideline substantially overstates the seriousness of the offense . . . downward departure may be warranted."[8] Loss can overstate seriousness "when the defendant's effort to remedy the wrong merits consideration, as, for example, where he makes extraordinary restitution."[9]

The Sixth Circuit likewise recognizes that "exceptional rehabilitation can support downward departure."[10] The Sixth Circuit has "acknowledged that *voluntary* restitutionary payments may constitute 'exceptional circumstances' that justify a downward departure greater than that contemplated in Section 3E1.1."[11]

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[8] USSG § 2B1.1, App. Note 20(C).

[9] *United States v. Redemann*, 295 F.Supp.2d 887, 899 (E.D. Wisc. 2003) (citations omitted) (overstated-loss departures also appropriate "when there is a gross disparity between the actual loss and the defendant's intended loss").

[10] *United States v. Allman*, 119 Fed.Appx. 751, 755 (6th Cir. 2005).

[11] *United States v. DeMonte*, 25 F.3d 343, 346 (6th Cir. 1994).

Extraordinary restitution also strongly supports consideration under § 3553(a)(1)'s broader umbrella. For example, in *United States v. Biehl*,[12] a bank's chief executive officer made ten fraudulent loans over a three-year period. Facing $76,779 in restitution, Biehl paid about $14,000 in the 30 months between his plea and sentencing. While two of the three judges deciding Biehl's appeal held that the restitution paid was not "exceptional," the entire Sixth Circuit panel acknowledged that exceptional restitution can take a case outside the heartland.[13]

The Eleventh Circuit found an exceptional case in *United States v. Kim*.[14] Husband and wife defendants pleaded guilty to defrauding a federal food program of $268,237. They paid $50,000 toward restitution on the day they pleaded guilty, and then paid the balance of $218,237.03 at sentencing. The district court departed downward, from Mr. Kim's Level 13[15] and Mrs. Kim's Level 10, and sentenced both spouses to probation conditioned on home confinement.

The Eleventh Circuit upheld the Kims' probation sentences, noting that "courts have looked to a wide range of factors, such as the degree of voluntariness, the efforts to which a defendant went to make restitution, the percentage of funds restored, the timing of the restitution, and whether the defendant's motive demonstrates sincere remorse and acceptance of responsibility."[16]

Mr. Patel's limited personal benefit here is not a garden-variety fraud outcome, where an offender takes the money and runs. Mr. Patel instead admitted that he owed the $500,000 within three months, and has stood by that admission ever since. The $500,000 Guidelines "loss" long admitted by this defendant overstates the actual offense. Mr. Patel's extraordinary restitution *plus* interest also sets his offense conduct even further outside the heartland of wire fraudsters, many of whom will never be able to repay even the principle. Mr. Patel's investor is today better-than-whole.

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[12] *United States v. Biehl*, 173 F.3d 856, 1999 WL 98600 (Table, Unpubl.) (6th Cir. 1999).

[13] *See Biehl*, 1999 WL 98600 at *3.

[14] 364 F.3d 1235 (11th Cir. 2004).

[15] Mr. Kim's guideline range was 15-27 months.

[16] *Kim*, 364 F.3d at 1244; *see also DeMonte*, 25 F.3d at 347 (emphasizing voluntariness); *United States v. Oligmueller*, 198 F.3d 669, 672 (8th Cir. 1999) (emphasizing timing, voluntariness, efforts to pay, and percentage of funds repaid); *United States v. Hairston*, 96 F.3d 102, 108-09 (4th Cir. 1996) (percentage of funds restored, voluntariness, timing, and motive).

These circumstances merit consideration of an extraordinary sentence under 18 U.S.C. § 3553(a)(1).

B. Mr. Patel poses extremely low risk of re-offense

1. Zero Criminal History points

Mr. Patel has never before been in trouble. The Sentencing Commission notes "that first offenders are less culpable than other offenders."[17] It acknowledges that "sentencing reductions for 'first offenders' are supported by the recidivism data and would recognize their lower re-offending rates."[18] Congress likewise recognizes the "appropriateness of imposing a sentence other than imprisonment" for first-offenders without violence or similarly serious offenses.[19]

[17] U.S.S.C., "Recidivism and the First Offender," at 9 (Release 2, May 2004) [*http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_First_Offender.pdf* , last visited 3/3/2016].

[18] U.S.S.C., "Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines," at page 15 (hereafter, "Criminal History Computation") (Release 1, May 2004) [*http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf* , last visited 3/3/2016].

[19] 28 U.S.C. § 994(j); *accord*, "Recidivism and the First Offender," at 3.

The Sentencing Commission found that criminal history *points* better forecast re-offense risks than the Criminal History Category.[20] Offenders without a prior arrest, like Mr. Patel, re-offend just 6.8% of the time. Offenders with one criminal history point re-offend 22.6% of the time.[21]

2. Other Demographic indicators

Recidivism rates are influenced most by a defendant's personal characteristics, including several that Mr. Patel shares: (1) family ties; (2) a lack of substance abuse; and (3) a history of stable employment.[22] Further, "[r]ecidivism rates decline relatively consistently as age increases," from 35.5% of offenders under age 21, to 9.5% over age 50.[23]

Mr. Patel turned 57 in January 2016.

C. *Prior Good Works / Community Service*

Exceptional prior good works merit departure under USSG § 5H1.11, and § 3553(a)(1) gives even more weight to good works than do the Guidelines.[24] A defendant's extraordinary deeds can provide a basis for departure even where public service is part of one's job.[25]

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[20] U.S.S.C., "Criminal History Computation," at 7.

[21] *See*, "Recidivism and the First Offender," at 13-14; *United States v. Germosen*, 473 F.Supp.2d 221, 227 (D.Mass. 2007) (non-guideline sentence of six-months home detention warranted partly because "there is a demonstrable difference in the recidivism rates of real first offenders as compared to other defendants in Criminal History Category I.").

[22] U.S.S.C., "Criminal History Computation," at 11-14.

[23] U.S.S.C., "Criminal History Computation," at 12 and 28, Exh. 9.

[24] *See, e.g., United States v. Tomko*, 562 F.3d 558, 571 (3d Cir. 2009) (upholding variance for, *inter alia*, prior good works not adequately addressed in the Guidelines); *accord United States v. Tomlinson*, 12 F. App'x 235, 247 (6th Cir. 2001) (sentencing court had authority to grant downward departure for prior good works).

[25] *See United States v. Serafini*, 233 F.3d 758, 772 (3d Cir. 2000) (quoting *United States v. Sweeting*, 213 F.3d 95, 100 (3d Cir. 2000)) (departure for public servant's prior good works).

Douglas Collins, who has worked with Mr. Patel for a quarter century, discusses (Exhibit 4) Mr. Patel's work to improve the hotel industry, and those in it:

> R.C. is respected and admired throughout the country as a leader in the hospitality industry. He has routinely and repeatedly served as a volunteer on various franchise brand advisory boards, which address issues that benefit his fellow franchisees and ultimately all hotel owners. Perhaps his greatest industry legacy is his extensive leadership work with the Asian American Hotel Owners Association (AAHOA). He and his family were instrumental in the founding of this group in 1989 as a vehicle for fighting discrimination against Asian American hoteliers by lenders, insurance companies, and franchise companies. . . . Due directly to visionary, energetic and selfless individuals such as R.C., AAHOA has become one of the world's largest, most influential hotel advocacy groups responsible for creating hundreds of thousands of jobs and for paying millions of dollars in taxes every year.

Abroad, Mr. Patel has supported underprivileged children in his native Uganda, with educational materials and other aid for Hilltop High School in Masaka, Uganda. In 1990, Mr. Patel formed the CP Patel Memorial Trust in rural Baroda Guirat, India. That Trust has fed over 100 malnourished children and seniors every day for the past 25 years, with over 500 served every Thursday. It will continue to feed these vulnerable persons well into the future, using interest earned on the Trust's principal endowment.[26] (Exhibit 5).

Mr. Patel is also deeply involved with the Middle Tennessee Mission Outreach ("MTMO").[27] MTMO is a multi-denominational Christian organization that has "worked in almost 50 hard-to-reach villages and invested almost half a million dollars" bringing humanitarian supplies, medical care, and water and sanitation projects to the impoverished of Honduras. Mr. Patel's most recent mission trip, in January 2016, is photographically documented at (Exh. 6)

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[26] *See* Exh. 5 formation and fiscal records.

[27] *See http://www.mtmo.org/* (last visited 3/3/2016).

In 2001, after an earthquake devastated in Gujarat, India,[28] Mr. Patel helped to establish a disaster relief fund. This fund, now known as the American India Fund,[29] supports over 23 million people living in poverty. Meanwhile, back in Atlanta, Mr. Patel has also devoted substantial effort to the Youth Ensemble of Atlanta (YEA), a group discussed further in Section III, (Exhibit 7).

As the associated video documents, Mr. Patel has made an extraordinary effort to give to back to his communities. Dozens of charities and hundreds of families – from Alabama, Nashville, and Atlanta, to Uganda, Honduras, and India – have benefitted from his selflessness and generosity. Mr. Patel made a bad decision here, but that cannot wholly outweigh his immense commitment and contributions to the world (Exhibit 8).

Mr. Patel merits substantial consideration under § 3553(a)(1) for his extraordinary positive role in the world to this point, and going forward.

D. Family Circumstances

The Patels have three sons. Middle son Mayur “Mel” Patel (age 32) contracted viral meningitis as an infant, and has always suffered severe developmental debilities. Mel always stayed far behind his peers’ milestones, and physicians confirmed severe learning disabilities at an early age.[30] School was an extreme challenge for Mel, and for his parents.

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[28] The U.S. Geological Survey reports this earthquake, which killed over 20,000 people, was the deadliest earthquake in 2001. See *http://earthquake.usgs.gov/earthquakes/eqarchives/year/2001/* (last visited 3/3/2016).

[29] *See http://aif.org/* (last visited 3/3/2016).

[30] To protect Mel Patel’s privacy, we do not append the many psychological materials associated with his development and education. We will gladly make these materials available to the Court, under seal, if it believes that documentation to be necessary.

Educators told the Patels that Mel would never graduate from high school. But the Patels refused to accept that their son was fated to fail. With testing from private professionals and DeKalb County (Georgia) Schools psychologists, they were able to secure Mel's admission to Brandon Hall School in Atlanta. Then they drove a hundred miles every day, for years, to ensure that Mel got the specialized education he needed. Mel modeled the commitment his parents showed, and he graduated high school in 2004.

Now 32, Mel's intellectual abilities still resemble those of a young teenager. Mel sees the world around him through a child's eyes. He can keep himself clean and fed – if there is food in the fridge – but he is no more ready to live on his own than a pubescent youth. Mel thus still lives at home. But, Mrs. Patel faces her own physical difficulties, including crippling arthritis. Mr. Patel thus remains Mel's primary caretaker and provider.

The Guidelines permit downward departures for extraordinary family circumstances.[31] Application Note 1(B) offers four criteria to weigh the propriety of a family circumstances departure:

(i) Guidelines sentence will cause a substantial, direct, and specific loss of essential caretaking or financial support to family

(ii) That loss substantially exceeds ordinary harms of incarceration

(iii) There is no effective remediation of those harms reasonably available, making that caretaking or financial support irreplaceable.

(iv) Departure effectively addresses the loss.

[31] *See* USSG § 5H1.6.

We stand by the plea agreement, and do not seek downward departure. We also do not suggest that Mr. Patel's caretaking responsibilities rise to the Guidelines' exacting standards. But these principles can inform the Court's still broader authority under 18 U.S.C. § 3553(a)(1) (offender circumstances) to balance punishment, incapacitation, deterrence, and rehabilitation with the role that Mr. Patel offers at home.

Mel's brother is already consumed with his own newborn, while his mother is physically incapable of providing the guidance and caretaking that falls to his father. Mr. Patel serves an irreplaceable role in Mel's caretaking. Removing Mr. Patel from Mel's daily life will cause a substantial, direct, and specific loss of essential caretaking. While these effects might not exceed the harms suffered by a typical child in another, typical sentencing, a statutorily mitigated sentence – as a small part of the total § 3553(a) consideration we seek here – would effectively address Mel's caretaking loss.

E. Extraordinary history and nature of this offender, Mr. Patel

Mr. Patel was born January 7, 1959, in the remote Ugandan village of Kakuto. His family fled Idi Amin's brutal dictatorship in 1969, arriving in London with only the possessions they could carry and the equivalent a few hundred dollars. The entire family took jobs to support themselves. Besides attending school, the young Mr. Patel delivered newspapers, and worked as a mechanic, and labored on farms in the summer, and did whatever else he could to help feed his family.

Mr. Patel attended school until he saved enough money to open a small convenience store in a rented London storefront. After opening the shop, Mr. Patel toiled nonstop until he was supporting himself and several other family members with his profits. Then Mr. Patel married Shama Patel in London, on September 24, 1979.

The couple worked in the London shop until they sold it in early 1981, and moved to Chicago, Illinois. Ever the entrepreneur, Mr. Patel turned his experienced retail eye toward the rescue of distressed hotels. In June 1981, he bought a Holiday Inn and moved his family to Riverside, Alabama.

To contain costs, the young family lived in a mobile home on the property. To survive the frequent discrimination and abuse, these Indian immigrants in rural Alabama stuck together, and grew stronger. Mr. and Mrs. Patel quickly taught themselves the hospitality industry, from housekeeping and industrial maintenance to management and marketing. Soon the hotel's financial hemorrhaging stopped. They persevered until, as with Mr. Patel's London shop, they thrived.

By February 1984, Mr. Patel recognized that his Riverside business largely came from the railroads. So he decided to expand, by purchasing hotels in major Southeastern rail markets. He sold the Riverside Holiday Inn, bought a Diplomat Inn Motel in Montgomery, Alabama, and procured fresh railroad lodging contracts. Mr. and Mrs. Patel worked the hotel every day, alongside the three sons they were teaching about honest, hard work.

Mr. Patel soon made the Diplomat Inn profitable, and then he bought more hotels in Tennessee and Georgia. This growth allowed Mr. Patel not just to provide for his wife and sons. He was also able to sponsor immigration of over 50 family members and friends. Once Stateside, every one of Mr. Patel's wards got a job, a place to stay, and stake money to start their own American dreams.

In July 1989, the Patels moved to Goodlettsville, Tennessee. The move allowed Mr. Patel to spend more time with his family, even as he bought more hotels. Eager to introduce his boys to soccer, a sport that sustained him through his own impoverished childhood, Mr. Patel helped create Goodlettsville's first youth soccer league in 1989. This youth league still thrives today.[32]

Seeing more opportunity, Mr. Patel moved his family to Atlanta. He and other family members bought a Days Inn. Hard work and good timing again rewarded the Patels – the 1996 Olympic Games and a separate economic boom helped him quickly turn profit with the Days Inn. Along the way, Mr. Patel also fostered a deep, positive relationship with the City of Atlanta, and local corporations like Coca-Cola and Delta.

But Mr. Patel wanted more financial security than the volatile hospitality industry could offer. So after the Atlanta Olympics closed, Mr. Patel sold most of his hotels and expanded into other commercial realty projects. He further diversified into property and casualty insurance in 2000, and chartered three community banks in Georgia and Florida that focused on under-served minorities and small business lending. Those three banks eventually provided small business loans that created thousands of jobs, and improved communities through hundreds of millions of dollars in investments.

Over his 35-year real estate career, Mr. Patel has, astoundingly, bought or built over 125 hotels, retail centers, offices and apartment buildings.

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[32] *See http://www.mtfcsoccer.com/* (last visited 2/7/2016).

F. Destruction of Business and Personal Reputations both Deters and Punishes

As former President Bush recognized, when commuting Lewis Libby's perjury and obstruction of justice sentence from 30 months to probation, "the consequences of his felony conviction . . . will be long-lasting" and "harsh."[33] (Exhibit 9).

These same collateral consequences add significantly to Mr. Patel's punishment, while his example will deter others from similar offenses. Mr. Patel's lifetime of good is all but forgotten now. Strangers see only the fraudster painted in news articles and DOJ press releases.[34]

In *United States v. Gardellini,*[35] the court departed from a range of 10-16 months to probation in part because defendant "already suffered substantially due to the criminal investigation." And, in *United States v. Anderson,*[36] a departure was reasonable in part because the defendant had suffered loss of reputation and his company.

Though Mr. Patel will survive this prosecution, his reputation has already died a very public death. The shame and distress his family has suffered deters him from future misconduct, and serves as an ugly example to others. It has also satisfied at least a part of the punishment required here.

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[33] *See* White House Office of the Press Secretary, "Statement by the President on Executive Clemency for Lewis Libby," July 2, 2007 (**http://georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070702-3.html/**) (regarding *United States v. Libby*, Dist. Ct. No. 1:05-CR-00394-RBW-1 (D. D.C. 2007)).

[34] *See, e.g.*, USDOJ Press Release, "CEO Of Diplomat Companies Pleads Guilty To Defrauding Investor," 7/13/2015 (*http://www.justice.gov/usao-mdtn/pr/ceo-diplomat-companies-pleads-guilty-defrauding-investor*); Joshua Sharpe, "Duluth hotel developer R.C. Patel pleads guilty to $500k fraud," GWINNETT DAILY POST ONLINE (7/14/2015) (*http://www.gwinnettdailypost.com/news/2015/jul/14/duluth-hotel-developer-rc-patel-pleads-guilty-to/*); Stacey Barchenger, "Man who ripped off Brentwood investor pleads guilty," THE TENNESSEAN (7/13/2015) (*http://www.tennessean.com/story/news/local/2015/07/13/man-guilty-wire-fraud-brentwood-tennessee/30099969/*).

[35] 545 F.3d 1089, 1095 (D.C. Cir. 2008).

[36] 533 F.3d 623, 633-34 (8th Cir. 2008).

III. PROBATION AND COMMUNITY SERVICE SERVES SENTENCING'S PURPOSES WITHOUT UNDERSTATING OFFENSE

Among the other factors, 18 U.S.C. § 3553(a)(3) requires consideration of "the kinds of sentences available." Probation is available here, and it is the kind of sentence that can punish and deter Mr. Patel and others, while also serving Sentencing Commission goals to reduce imprisonment through alternative, community punishments.

The *Gall* Court specifically noted that probation constitutes significant punishment through "substantial restriction of freedom."[37] The Court:

> recognize[d] that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty. . . . Probationers may not leave the judicial district, move, or change jobs without notifying, and in some cases, receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their homes, and refrain from associating with any person convicted of a felony, [*et cetera*]. Most probationers are also subject to individual "special conditions" imposed by the Court.[38]

In *United States v. Knights*, the Supreme Court noted that "[p]robation is 'one point . . . on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service."[39] Inherent in a probation term is that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled'."[40]

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[37] *Gall v. United States*, 552 U.S. 38, 48 (2007).

[38] *Gall*, 552 U.S. at 595-96.

Given probation's value as a sentencing tool, the Sentencing Commission studied "the need for greater availability of alternatives to incarceration for certain nonviolent first offenders." Based on that research, it amended the November 2010 Guidelines to "provide[-] a greater range of sentencing options to courts."[41] As the Commission explained:

> The amendment is a result of the Commission's continued multi-year study of alternatives to incarceration. The Commission initiated this study in recognition of increased interest in alternatives to incarceration by all three branches of government and renewed public debate about the size of the federal prison population and the need for greater availability of alternatives to incarceration for certain nonviolent first offenders.[42]

Various courts have used sentences including probation and community service for non-violent first offenders like Mr. Patel. In an off-shore tax evasion case involving a combined financial penalty of over $80 million, Senior District Judge Charles Kocoras (Northern District of Illinois) imposed a sentence of two years' probation with 500 hours of community service.[43] Despite the advisory sentencing range of 46-57 months imprisonment, Judge Kocoras determined that the defendant's prior good works, charitable donations, and positive community contributions set him apart from the average offender. Noted Judge Kocoras:

> [W]hat I found most significant is that, yes, he committed crimes; he hid; he acted in a way that a lot of other people acted, who try to cheat the government. . . . But . . . he did things that I am not aware anyone else does. Certainly, not anyone before me.

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[39] *Knights*, 534 U.S. 112, 119 (2001) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)).

[40] *Knights,* 534 U.S. at 119 *(quoting Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

[41] USSG, Appendix C, Vol. II, at 343, Amd. 738 (Nov. 1, 2010).

[42] *Id.*, at 343.

[43] *United States v. H. Ty Warner*, 13-CR-731 (N.D. Ill. 2014).

> And it would be unjust for me to ignore that, not measure it and not say, in the end, that trumps all of the ill-will and misconduct he engaged in. And really – and I believe this with all of my heart – society will be best served by allowing him to continue his good works.[44]

The Seventh Circuit affirmed Judge Kocoras' probationary decision.[45]

Judges may impose conditional probation as "a burdensome penalty that meets with widespread public approval, is inexpensive to administer . . . produces public value . . . [and] can to a significant extent be scaled to the seriousness of crimes."[46] The U.S. Courts' Administrative Office described community service as "a way for the offender to repay or restore the community. It is practical, cost-effective, and fair – a 'win-win' proposition for everyone involved."[47] The Administrative Office recognizes that "community service addresses the traditional sentencing goals of punishment, reparation, restitution, and rehabilitation. . . . It restricts offenders' personal liberty . . . allows offenders to atone or 'make the victim whole' in a constructive way . . . [and] may be regarded as . . . symbolic restitution when the community is the victim."

U.S. Probation and Pretrial Services recommends that community service candidates be "offenders with personal and social stability, who are willing, motivated, and who have no history of violence."[48] Mr. Patel epitomizes this description. Mr. Patel is a first-time offender with no history of violence, and a profound motivation to keep serving his community and his family. A probationary sentence would allow him to keep providing for that large family, and for the community he has helped to support for many years, while also enduring a substantial loss of liberty.

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[44] *Warner*, 13-CR-731 (N.D. Ill.), DE 33 (Sentencing Hearing Transcript) at 52-53.

[45] *United States of America v. H. Ty Warner*, App. No. 14-1330 (7th Cir. 7/10/2015).

[46] *See* National Institute of Justice, "Intermediate Sanctions in Sentencing Guidelines," at 11 (May 1997) (*https://www.ncjrs.gov/pdffiles/165043.pdf* , last visited 3/3/2016).

[47] *Court & Community: An Information Series About US Probation & Pretrial Services: Community Service*, Office of Probation and Pretrial Services, Administrative Office of the U.S. Court, 2007 (*http://www.miep.uscourts.gov/PDFFIles/court_community_all.pdf* , last visited 3/3/2016).

[48] *Id.*

Mr. Patel's business expertise could greatly benefit the Youth Ensemble of Atlanta (YEA), a group mentioned above with whom he already has a volunteer relationship. YEA was founded in 1990 by Freddie Hendrick. Today it is the South's premiere African-American youth theatre company. It provides an outlet for Atlanta's young to explore and express their feelings, while developing crucial communication and life skills; cultural awareness; an appreciation for diversity; and commitments to excellence and community service.

Deborah Barber, YEA's executive director, believes that Mr. Patel's prior volunteer experience, his knowledge of the organization, his commitment to YEA's growth, and his professional expertise lend many substantial tools that YEA needs.

Ms. Barber envisions Mr. Patel further helping YEA in five different ways:

1. Using his commercial realty acumen to help YEA find and finance a permanent home theater space;
2. Preparing a long-term business plan
3. Helping to increase YEA's local visibility (Even with YEA's critical acclaim and performances to packed houses around the world, the organization is virtually unknown in its own home town of Atlanta.)
4. Helping YEA's development and general fundraising efforts
5. Directly mentoring youth.

Ms. Barber would supervise any term of community service ordered by the Court, and would be happy to provide whatever structure and reporting the Court would require. She looks forward to having Mr. Patel's continued support, should he be graced with a community service term (Exhibit 10).

IV. CONCLUSION

Respect for the law, just punishment, and deterrence drive federal sentencing. But, too harsh a sentence fails to respect the law just as much as too lenient a sentence.[49] It also violates the statute requiring this sentence to be no greater than necessary.[50]

Mr. Patel's Class C felony requires no minimum prison term. "Congress does not only envision, but accepted, the possibility that some defendants found guilty . . . would receive no jail time at all."[51] This Court "has flexibility in fashioning a sentence outside of the Guidelines range," and need only "set forth enough to satisfy the appellate court that it has considered the parties' arguments and has a reasoned basis" for its decision.[52]

Counsel urges probation conditioned upon six months of home confinement and community service obligations of 120 hours (three work weeks) per year. We ask that Mr. Patel's debt to the community be repaid directly to the community, through his time and labor, rather than just consuming resources in federal prison. The additional condition of home detention can satisfy any additional, significant sanction demanded by punishment and deterrence.

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[49] *See* Justice Anthony Kennedy, Testimony before Senate Judiciary Committee, 2/14/2007 ("Our sentences are too long, our sentences are too severe, our sentences are too harsh. . . there's no compassion in the system. There's no mercy in the system.").

[50] 18 U.S.C. § 3553(a).

[51] *United States v. Husein*, 478 F.3d 318, 332 (6th Cir. 2007).

[52] *United States v. Diosdado–Star*, 630 F.3d 359, 364 (4th Cir.) [internal quotation omitted]; *see also United States v. Bolds*, 511 F.3d 568, 580 (6th Cir. 2007) ("our final task is to ensure that the district court has adequately explain[ed] the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.").

Mr. Patel understands that violating *any* probation condition can mean the same lengthy sentence he faces now, without any credit for any time spent under supervision. Given this matter's extraordinary facts, we respectfully urge that a probationary sentence adequately reflects the seriousness of the offense, promotes respect for the law, and provides just punishment.[53]

[53] For the Court's convenience, we include Proposed Findings of Fact as Appendix 1.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was electronically filed with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

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On this the 11th day of March, 2016.

____/s/ Hal Hardin___________
Hal Hardin